Supreme Court, U. S.
FILED
JUL 5 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM 1978

No. 78-1268

GEORGE MARTINEZ, et al.,
Appellants,

vs.

THE STATE OF CALIFORNIA, et al.,
Respondents.

**On Appeal From The Court Of Appeal
Of The State Of California,
Fourth Appellate District, Division One**

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS GEORGE MARTINEZ, ET AL.

RONALD A. ZUMBRUN
JOHN H. FINDLEY
Counsel, Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, California 95814
Telephone: (916) 444-0154
*Attorneys for Amicus Curiae
Pacific Legal Foundation*

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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INTEREST OF AMICUS

Pursuant to Supreme Court Rule 42, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of appellant George Martinez. Consent to the filing of this brief has been granted by counsel for both the parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the

public interest. Policy for Pacific Legal Foundation is established by an independent Board of Trustees, composed of concerned citizens, the majority of whom are attorneys. Many of Pacific Legal Foundation's members, contributors, and supporters have expressed concern regarding injuries inflicted by unrehabilitated criminals while on parole, the lack of restraints on California parole authorities, and the denial of redress through damages resulting from the immunity statute here at issue. In order to give voice to these concerns, the Pacific Legal Foundation Board of Trustees has authorized the filing of this brief.

Pacific Legal Foundation strongly believes that absolute immunity for parole boards is contrary to public policy in that it discourages parole boards from considering the risk to public safety inherent in the premature release of unrehabilitated felons. Rather, a qualified immunity is sufficient to protect good faith action by parole boards while still allowing injured members of the public redress for parole board actions which shock the conscience.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, is reported at 85 Cal. App. 3d 430 (1978).

STATEMENT OF THE CASE

This lawsuit was filed by George Martinez against the State of California seeking compensatory and punitive damages for the wrongful death of his fifteen year old daughter. Mary Ellen Martinez was kidnapped and murdered by Richard June-Jordan Thomas, a convicted

rapist who had been designated a Mentally Disordered Sex Offender, not amenable to treatment. Perhaps because of Thomas' history of torturing young girls in attempts to rape them, the committing judge had recommended that Thomas not be paroled. During his incarceration, Thomas had received no psychiatric treatment. Despite this alarming case history and despite the fact that Thomas had had no recent psychiatric evaluation, California parole officials released Thomas on parole fifteen years prior to the expiration of his sentence. Five months after his parole, Thomas killed Mary Ellen Martinez. The California courts dismissed Mr. Martinez's lawsuit, ruling that California Government Code §845.8 provides absolute immunity to the state and its employees for actions in connection with the release of prisoners on parole.

ARGUMENT

I

EQUAL PROTECTION OF THE LAWS PRECLUDES ABSOLUTE IMMUNITY FOR STATE PAROLE OFFICIALS

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 397 (1971), this Court, in examining the claimed absolute immunity of federal agents for their actions, put the issue precisely:

> "The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts."

The issue here is similar: whether appellant Martinez, if he can demonstrate an injury caused by the violation of his constitutional rights by California agents, is entitled to redress his injury through the remedy of damages which are normally awarded in state and federal courts in the absence of statutory immunity.

Mr. Martinez has brought suit for damages to redress the wrongs resulting in his daughter's death. His causes of action in this regard are reminiscent of those in *Scheuer v. Rhodes*, 416 U.S. 232, 235 (1974), in which the plaintiffs sued the Governor of Ohio and other state officers alleging that they intentionally, recklessly, willfully, and wantonly caused an unnecessary deployment of the Ohio National Guard on the Kent State campus resulting in the death of plaintiffs' decedents. The complaints there alleged that the action deprived the decedents of their lives and rights without due process of law:

> "Fairly read, the complaints allege that each of the named defendants, in undertaking such actions, acted either outside the scope of his respective office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful powers of office." *Id.*

Fairly read, the complaint here at issue makes the same allegation of acts, either outside the scope of office, or if within such scope, acts so arbitrary as to abuse grossly the lawful powers of office. As in *Scheuer*, so here, the primary question is whether the lower court:

> "acted prematurely and hence erroneously in dismissing the complaints on the stated grounds, thus precluding any opportunity for the plaintiffs by subsequent proof to establish a claim." *Id.* at 236.

As in *Scheuer*, so here, that primary question must be answered in the affirmative.

From the time our Republic was founded, this Court has recognized that:

> "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws . . . ." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

Only last term, this Court reaffirmed that, historically, damages have been regarded as the ordinary remedy for an invasion of the personal interest in liberty. *Butz v. Economou*, ... U.S. ....., 46 U.S.L.W. 4952, 4954 (1978).

The Fourteenth Amendment plainly protects the rights of individuals from deprivation by the state of life, liberty, or property:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Ironically, only the fact that the defendants are state officers prevents Martinez from obtaining the ordinary remedy for such invasion of civil liberties. California Government Code § 845.8[1] shields both the state and its employees from the consequences of their wrongful acts in prematurely releasing on parole an individual who such employees had reason to know was not rehabilitated and

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[1]Government Code § 845.8 provides in pertinent part:

> "Neither a public entity nor a public employee is liable for:
>
> "(a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release."

remained a danger to the public. The California Court of Appeal ruled that even if the defendant public employees had abused their discretion by granting parole—knowing the prisoner had tortured two girls in attempting to rape them, was an untreatable mentally disordered sex offender with a recommendation of no parole, had received no psychiatric treatment during his incarceration and had had no psychiatric evaluation as part of the parole determination—these factors could not overcome the immunity dictated by Section 845.8. *Martinez v. California,* 85 Cal. App. 3d 430, 434 (1978). The court therefore affirmed the dismissal of the action without leave to amend, *id.* at 438, leaving Martinez wronged but without a remedy.

Section 845.8 has been construed by the California courts to protect public employees in order to encourage the parole of prisoners to the exclusion of the rights and interests of members of the public. It is this failure to balance the interests of endangered members of the public with the interests of the prisoners seeking parole which constitutes a denial of due process and equal protection of the laws to persons in the position of Martinez.

The California courts have proven themselves almost cavalier in their disregard of the interests of the public in these matters. In *Whitcombe v. County of Yolo,* 73 Cal. App. 3d 698 (1977), a prisoner known to be violent was released; six days later the prisoner crushed the skull of one victim with a shotgun butt and strangled another victim into unconsciousness. In holding the releasing officials immune under Section 845.8 the court gave short shrift to redressing the victims' injuries:

> "Of paramount concern is the detrimental effect a finding of liability would have on prisoner release and rehabilitation programs. Were we to find a cause of action stated we would in effect be encouraging the detention of prisoners in disregard of their rights and society's needs." *Whitcombe,* 73 Cal. App. 3d at 716.

The court went on to say that while it recognized the grievousness of the victims' injuries, Section 845.8 is concerned with a greater social injury; the concerns of facilitating the reentry into society of "diverse individuals" outweighs the desirability of providing victims relief through the judicial process. *Id.* at 716-17.

The California Supreme Court reduced this philosophy to its essence in *Johnson v. State of California,* 69 Cal. 2d 782, 799 (1968):

> "[S]ection 845.8 requires that each member of the general public who chances to come into contact with a parolee bear the risk that the rehabilitative effort will fail . . . ."

Whitcombe and *Johnson* demonstrate that California recognizes that there are rights and risks involved in the parole process, but the state places all the rights with the parolee and all the risks with the members of the public. Amicus contends that the United States Constitution requires the opposite result.

This Court put the issue in perspective this term in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex,* ..... U.S. ....., 47 U.S.L.W. 4581 (1979). This Court there stated in the plainest terms:

> "There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Id.* at 4583.

In language pertinent to the present controversy, the Court quoted Judge Friendly's comment on the human difference between losing what one has and not getting what one wants. *Id.* at 4584. The Court made clear that protection against the loss of an existing interest outweighs the failure to obtain the object of one's hopes. So here, protection of members of the public against loss of life or other injury should outweigh the prisoner's hope for parole. The California courts' reversal of these principles denies the rights of due process and equal protection guaranteed by the Fourteenth Amendment.

This Court noted in *Butz* that the extension of absolute immunity from damages liability to executive officials would seriously erode the protection provided by basic constitutional guarantees:

> "In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees." *Butz,* 46 U.S.L.W. at 4960.

In that case, this Court reaffirmed the principle that all individuals, whatever their position in government, are subject to the law:

> "'All officers of the government, from the highest to the least, are creatures of the law, and are bound to obey it.'" *Id.*

The Court, in light of this principle, found that government officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope. *Id.* The Court then observed that public policy considerations support a limited immunity for executive officials. While officials who are required to exercise their

discretion need to be protected in order to encourage the vigorous exercise of official authority, it is not unfair to hold liable the official who knows or should know that he is acting outside the law. Finding that insisting on an awareness of clearly defined constitutional limits will not unduly interfere with the exercise of official judgment, this Court held in *Butz* that in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to a qualified immunity. *Id.* Equal protection of the laws demand that state executive officials, including the defending parole officials, be held to that same standard of qualified immunity.

II

PAROLE OFFICIALS ARE ENTITLED TO ONLY A QUALIFIED IMMUNITY UNDER SECTION 1983

Appellant Martinez's complaint alleged violation of the Federal Civil Rights Act, 42 U.S.C. § 1983, saying the acts of the individual defendants under California Penal Code §§ 5075 and 5077[2] deprived plaintiff's decedent of her life and liberty. *Martinez,* 85 Cal. App. 3d at 436. The court below, however, ruled that such official acts are privileged if done within the scope of their official duties. The court further found that as members of the Adult Authority[3] the respondents are performing quasi-judicial functions when they make determinations regarding parole and are, therefore, immune from suit under the Civil Rights Act. *Id.*

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[2]Section 5075 concerns the members, appointment term, vacancies, and qualifications of persons on the Community Release Board while Section 5077 deals with granting and revoking of parole by that Board. *Martinez v. California,* 85 Cal.App.3d 430, 436 n.3 (1978).

[3]Retitled Community Release Board by Cal. Stats. 1976, ch. 1139.

Title 42, United States Code, Section 1983, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

This Court declared in *Monroe v. Pape*, 365 U.S. 167, 187 (1961), that Section 1983 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions. The respondent state officials, however, claim that because of their official positions they are absolutely immune from liability under Section 1983 and therefore not responsible for the natural consequences of their actions.

As was said in *Scheuer v. Rhodes*, 416 U.S. at 243, it can hardly be argued at this late date that under no circumstances can the officers of state government be subject to liability under Section 1983. In *Procunier v. Navarette*, 434 U.S. 555, 561 (1978), this Court stated that while recognizing that Congress in enacting Section 1983 must have intended to expose state officials to damages in some circumstances, the Court has consistently construed the section as not intending wholesale revocation of the common law immunity afforded government officials. While legislators, judges, and prosecutors have been held absolutely immune from damages liability under Section 1983, only a qualified immunity from damage is available to a

state governor, a president of a state university, National Guard members, school board members, the superintendent of a state mental hospital, and police officers. *Id.*

As noted in *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976), the procedural difference between an absolute and a qualified immunity is critical. An absolute immunity defeats a suit at the outset, so long as the officials' acts were within the scope of immunity. The fate of an official with qualified immunity, however, depends on the circumstances and motivations of his actions, as established by the evidence at trial. *Id.*

While amicus believes that the nature of their responsibilities entitle the parole officials here to a degree of immunity, neither legal precedent nor public policy supports their claim of absolute immunity. As noted above, only legislators, judges, and prosecutors enjoy absolute immunity under Section 1983. But these were immunities established at common law. The legislative record gives no clear indication that Congress meant to abolish wholesale all common law immunities and it is to be presumed that had Congress so intended, it would have specifically so provided. *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967).

There is, of course, no common law immunity for parole officials:

> "Indeed the very institution of parole is still in an experimental stage." *Greenholtz v. Inmates*, 47 U.S.L.W. at 4583.

The court below, however, found that parole determinations are a quasi-judicial function, thereby entitling respondents to absolute immunity. *Martinez*, 85 Cal. App. 3d at 436.

In *Butz v. Economou, supra,* this Court discussed the nature of judicial immunity in determining the degree of protection afforded administrative law judges. The Court pointed out that safeguards built into the judicial process tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct:

> "The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges [footnote omitted]. Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court. Jurors are carefully screened to remove all possibility of bias. Witnesses are, of course, subject to the rigors of cross-examination and the penalty of perjury. Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decision-making process, there is a less pressing need for individual suits to correct constitutional error." *Butz,* 46 U.S.L.W. at 4961.

None of these factors exist in the California parole system. Appointment is highly political with members of the Community Release Board not only appointed by the Governor but dependent upon him for reappointment. Cal. Penal Code § 5075. The Board is further politicized by the statutory mandate that its membership reflect the state's various racial, sexual, and economic groups. *Id.* Furthermore, the checks provided by the adversary system and carefully screened jurors are absent since these concepts are unknown to the parole system. Nor are witnesses subject to rigorous cross-examination under penalty of perjury since these features of the adversary system do not apply in the parole process.

Perhaps the most important factor justifying judicial immunity is that a judge's errors may be corrected on appeal. *Pierson v. Ray,* 386 U.S. at 554; *Butz,* 46 U.S.L.W. at 4961. While it may be true that the prisoner may seek judicial review of decisions adversely affecting him by habeas corpus, there is no recourse to the courts for the public when a parole board wrongfully releases an unrehabilitated felon into its midst. The public has no appeal. As this Court said regarding a member of the public who had no recourse other than Section 1983 for his injuries:

> "'For people in Bivens' shoes, it is damages or nothing.'" *Butz,* 46 U.S.L.W. at 4959, quoting *Bivens,* 403 U.S. at 410 (Harlan, J., concurring).

In the cases in which the Court has noted the quasi-judicial status of officials, only a qualified immunity was awarded, even though the safeguards noted in *Butz* and *Pierson* were present to a much greater degree than in the present case.

In *Wood v. Strickland,* 420 U.S. 308 (1975), the Court noted that:

> "[S]chool board members function at different times in the nature of legislators and adjudicators in the school disciplinary process." *Id.* at 319.

The Court further observed that:

> "School board members, among other duties, must judge whether there have been violations of school regulations and, if so, the appropriate sanctions for the violations." *Id.*

Although the decisions of school boards are subject to judicial review, *Cleveland Board of Education v. La Fleur,* 414 U.S. 632 (1974); *Goss v. Lopez,* 419 U.S. 565 (1975); *Hortonville Joint School District v. Hortonville Education Association,* 426 U.S. 482 (1976), the Court found that:

> "absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." *Wood v. Strickland,* 420 U.S. at 320.

In *O'Connor v. Donaldson,* 422 U.S. 563 (1975), an inmate of a state mental hospital brought a Section 1983 suit against the hospital staff. Like the respondents here, the hospital staff had the "quasi-judicial" power to release inmates. *Id.* at 567. Nonetheless, the Court refused to grant the hospital staff absolute immunity. Quoting from *Wood,* the Court reaffirmed the standard that the relevant question for the jury was whether the hospital superintendent:

> "'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [Donaldson], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [Donaldson].'" *Donaldson,* 422 U.S. at 577 (brackets in *Donaldson*).

Amicus believes that because of the above noted lack of safeguards for the public in the parole decision process, parole boards cannot be considered to come within even a

quasi-judicial definition, at least in relation to injured members of the public. Amicus notes, too, that parole boards are not faced with the burdens attendant upon other officials who are entitled to only qualified immunity. This Court noted in *Scheuer,* 416 U.S. at 246, that state governors like the police officers in *Pierson v. Ray,* 386 U.S. at 547, have a broad range of duties and authority and must often act swiftly and firmly at the risk that deferred action will be futile or constitute virtual abdication of office. It may also be noted that such officials are thrust into situations of major or minor civil disorders over which they have only tenuous control and in which they must sometimes make instantaneous decisions under great pressure. This contrasts strongly with parole officials, who have no other duties, who completely control the decision making process, who meet in the deliberate calm of climatically controlled offices, and whose decisions can be carefully reasoned through before implementation. In sum, parole board members face few of the pressures brought to bear on other officers of the executive branch.

Nonetheless, parole board members are often faced with difficult decisions and are entitled to some protection in their official capacity:

> "These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variations being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with

good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Scheuer v. Rhodes,* 416 U.S. at 247-48.

Under this qualified immunity a:

> "compensatory award will be appropriate only if the school [parole] board member has acted with such an impermissible motivation or with such disregard of the student's [public's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." *Wood v. Strickland,* 420 U.S. at 322.

Amicus believes that Section 1983 requires the invalidation of the state law granting absolute immunity to parole officials and the adoption of the *Scheuer* and *Wood* standards of qualified immunity for good faith actions.

CONCLUSION

As in *Scheuer,* 416 U.S. at 256, appellants' pleadings have specifically placed in issue whether the respondents were acting within the scope of their duties under the Constitution and state laws, whether they acted within the range of discretion permitted them under state law, and whether they acted in good faith as to the actions at issue. Here, as in *Scheuer,* further proceedings are required. The complaining party is entitled to be heard more fully than is permitted on a demurrer and the judgment below should therefore be reversed and remanded with instructions to accord the defending parole officials the qualified immunity available to other executive officers.

Dated July, 1979

Respectfully submitted,

RONALD A. ZUMBRUN
JOHN H. FINDLEY
Counsel, Pacific Legal Foundation
Attorneys for Amicus Curiae
Pacific Legal Foundation